

Before the
FEDERAL COMMUNICATIONS COMMISSION
Washington, D.C. 20554

In the Matter of)

Amendment of the Commission's)
Rules to Provide Exclusivity to)
Qualified Private Paging Systems)
at 929-930 MHz)

) PR Docket No.93-35
) RM-7986

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FEDERAL COMMUNICATIONS COMMISSION
OFFICE OF THE SECRETARY

To: The Commission

OPPOSITION TO MOTION TO STRIKE

Communication Innovations Corporation ("CIC"), by its attorney, respectfully submits this "Opposition" to a "Motion to Strike" filed by American Mobilphone, Inc. ("AMI") on June 23, 1994. By this "Motion", AMI seeks to prevent any consideration of CIC's "Reply Comments", filed a month earlier. 1/ AMI generally argues that CIC's comments constituted an untimely petition for reconsideration under

1/ CIC's Reply Comments were filed on May 18, 1994. By Public Notice, FCC Report Mimeo No. 1999 (March 1, 1994), Reply Comments were due within 25 days of the date of Federal Register publication. This occurred March 16, 1994. 59 Fed. Reg. 12327. Consequently, Reply Comments were due April 11, 1994. As CIC's Reply Comments were one month late, CIC respectfully requested that they be considered to be late filed comments. CIC served copies of its Reply Comments on all of the nine parties who filed Petitions for Reconsideration and/or Clarification: Association for Private Carrier Paging Section of the National Association of Business and Educational Radio, Inc. ("NABER"); Paging Network, Inc.; First National Paging Company, Inc.; Metrocall, Inc.; MAP Mobile Communications, Inc.; Carl N. Davis dba Afro-American Paging; American Mobilphone, Inc.; Pactel Paging; and Arch Communications, Inc. In addition, a Public Notice, FCC Mimeo No. 43390 (June 9, 1994), announced their receipt. AMI is the only party to respond to our Comments.

Although CIC stated that it would not object to responses, if any, we frankly did not anticipate a Motion to preclude any consideration of our views in this proceeding.

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Section 405 of the Communications Act ^{2/} and that their consideration would delay bringing this rulemaking to a close. The proceeding adopted rules to grant channel exclusivity to qualified local, regional, and national private paging ("private carrier paging" or "PCP") systems in the 929 -- 930 MHz band. ^{3/} CIC's Reply Comments supported the Commission's Report and Order, but generally agreed (ironically, as it turns out now) with petitioner AMI that the arbitrary date chosen to determine frequency exclusivity and system classification had produced capricious results and should be reconsidered or clarified.

AMI's Motion

At the outset, one must note that it is difficult to respond to a Motion which is long on preconceived legal conclusions and short on substantive analysis. Verbatim, AMI's argument is as follows:

[T]hough CIC's pleading references the Petition for Reconsideration filed by AMI, it is neither a reply nor an opposition to AMI's petition. CIC's pleading raises new arguments relating to the Commission's R&O, and as such is actually a petition for reconsideration. The only relief sought by CIC is a change in the R&O not requested by any of the petitioners, for the purpose of helping CIC's private needs. As a petition for reconsideration, CIC's pleading is, by statute, untimely and must be stricken.

... Though styled "Reply Comments", CIC's post-R&O pleading is really in the nature of a petition for reconsideration. CIC's

^{2/} 47 U.S.C. § 405.

^{3/} Report and Order, 8 FCC Rcd 8318 (1993), 58 Fed. Reg. 62289 (November 26, 1993); Notice of Proposed Rulemaking, 8 FCC Rcd 2227 (1993) ("Notice").

pleading asks the Commission to rethink some of the conclusions it reached in the R&O. See CIC Pleading pp. 7-10. No matter how a party wishes to style a pleading, if the whole purpose of the pleading is to ask the Commission to reconsider aspects of a report and order, the pleading is a petition for reconsideration, and is subject to Section 405 of the Communications Act of 1934, as amended... See Association of College and University Telecommunications Administrators, 72 RR 2d 356 (¶ 5)(1993).... 4/

This "test" to determine what constitutes a petition for reconsideration is ridiculous. All comments filed in a rulemaking proceeding seek to influence or to change Commission rules or policies. Otherwise they would not be filed.

No party can preclude the consideration of issues directly or indirectly raised by its petition for reconsideration simply by declaring it will not permit their recognition as a matter of law. Public policy, particularly in rulemaking proceedings, is best developed through broad public discussion, and not through select private control of the rulemaking agenda. To argue otherwise is to limit public participation and to prevent the Commission from hearing all the implications of its actions. This, in turn, would lead to an endless series of narrowly focused notices of proposed rulemaking which would preclude administrative finality, regulatory certainty, and the development of a workable regulatory scheme.

Indeed, a major purpose of Section 405 of the

4/ AMI Motion to Strike at 1-2.

Communications Act is to achieve administrative finality by limiting procedural "bites of the apple". This is made clear by the case cited by AMI as the basis of its "test":

5. While the Joint Higher Education Parties have styled their Petition as a petition for clarification, it is really a petition for reconsideration of the action the Commission took in the April Report and Order. Both ACUTA and NACUBO participated in that proceeding by filing comments or reply comments in response to the FNPRM. Specifically, both advocated their position, repeated now in their Petition, that colleges and universities should not be included within the definition of aggregator with respect to telephones located in dormitory rooms. In the April Report and Order, however, we specifically found that colleges and universities are clearly within the scope of the definition of aggregator. In so doing, we considered the comments and reply comments filed in response to the NPRM and the FNPRM by participating parties, including ACE, ACUTA, and NACUBO, the three entities that comprise the Joint Higher Education Parties. 5/

This case does not support some form of content "test" for petitions for reconsideration. Nor does it stand for the proposition that, where a party (such as CIC) has not participated before in a rulemaking proceeding, its comments must be ignored pursuant to Section 405 of the Act because they may raise additional issues implied by a petition for reconsideration.

Finally, what CIC filed was properly styled as "Reply Comments" in support of AMI's petition for reconsideration. AMI's petition protested as arbitrary and capricious the Commission decision not to permit the slow-growth option to

5/ Association of College and University Telecommunication Administrators, 8 FCC Rcd 1781, 1782 (¶ 5) (1993) [footnotes omitted].

licensees "grandfathered" as to frequency exclusivity as of October 14, 1993, the Sunshine Notice date for the Report and Order.

In essence, AMI argued that, without prior notice, the Commission had created two classes of PPS licensees with different substantive rights. "Grandfathered licensees", who received frequency exclusivity as of that date, but no slow-growth option; and "non-grandfathered licensees", who did not receive frequency exclusivity on that date, but were eligible for a slow-growth option. "Grandfathered licenses" were those "licenses granted based on applications filed before October 14, 1993 " ^{6/} AMI ably argued that this decision was arbitrary, capricious, and in probable violation of the Administrative Procedure Act, particularly because the Commission did not articulate a rationale.

Discussing the eligibility cut-off date which was choosen, AMI specifically stated in part:

[L]eaving the eligibility cut-off at the October 14, 1993 serves no purpose. No member of the affected industry changed its behavior vis-a-vis deciding to build a ... PCP system on that date. And the Commission would be hard-pressed to explain why one licensee, filing on October 15, is eligible, but another, filing October 13, 1993, is not eligible. At least if the March 21, 1993 release date of the NPRM is utilized, the Commission can have an explanation if challenged in court. ^{1/}

CIC's Reply Comments agreed with AMI that the arbitrary date choosen to determine frequency exclusivity and system

^{6/} AMI Petition for Partial Reconsideration at 3.

^{1/} AMI Petition for Partial Reconsideration at 7.

classification had produced capricious results and should be reconsidered by the Commission. CIC added two general arguments. First, we suggested that a more logical "cut off" date would be based upon the effective date of the new rules, i.e., thirty days after their publication in the Federal Register. AMI suggested that eligibility date should be the NPRM's release date. 8/ Secondly, CIC suggested that the Commission should consider applications in the process of being coordinated by NABER as of the "cut off" date for purposes of determining eligibility for frequency exclusivity. 9/

8/ AMI filed its 900 MHz PPS applications with NABER on May 18, 1993. Choosing the March 21, 1993 release date of the NPRM to determine "grandfathered" channel exclusivity would mean that AMI system would not be eligible.

9/ CIC made this suggestion because of NABER's "eight month rule". Prior to the Notice in this proceeding, PCP frequencies were available, and were applied for, on a shared basis only and were "not be assigned for the exclusive use of any licensee". 47 C.F.R. § 90.173. However, the Notice proposed that "conditional exclusivity would commence when the applicant's proposed system is assigned a frequency and would extend for eight months following initial licensing". Para. 30, 8 FCC Rcd at 2231. Left unclear was by who, and when, a frequency was considered to be assigned.

The Notice froze acceptance of PCP applications (Id. at 2233). But the Order lifting the freeze stated:

The existing rules, we wish to emphasize, require all 900 MHz private paging frequencies to be shared and all licensees to cooperate in the selection and use of frequencies to minimize interference with each other. We expect all parties in the application and coordination process to continue complying fully with these requirements while this proceeding is pending. 8 FCC Rcd 2460 (1993).

Nevertheless, NABER adopted an internal "eight month rule", under which protection from co-channel interference would begin immediately after frequency coordination by NABER and extend for eight months after the FCC licensed the station. See, NABER Petition for Rule Making, RM-7986 Pg. 11 fn. 19 (filed April 24, 1992). That is, interference protection

Conclusion

In conclusion, CIC believes that its late filed comments raised legitimate concerns whose consideration will strengthen this regulatory proceeding. None of these concerns was not within the scope of the issues raised by AMI's petition for reconsideration. AMI's motion to strike is without merit.

Nevertheless, CIC continues to agree with AMI that the arbitrary date chosen to determine frequency exclusivity and system classification has produced capricious results and should be reconsidered.

As CIC's filing history illustrated, the unanticipated selection of this date has seriously disrupted the systematic preparation and filing of a nationwide paging system.

Moreover, the date selected is not a logical choice. If there must be a "cut off" date, it should be based upon the publication date of the Federal Register. Finally, CIC believes that applications being coordinated by NABER be considered in any determination of grandfathered exclusivity.

would begin immediately after internal assignment of a frequency by NABER. This meant that NABER effectively precluded sharing during the pendency of this Rulemaking, because co-channel applications could not be filed with the FCC without NABER's coordination.

If our applications had not been returned by NABER under this policy, CIC would have had on file with the FCC applications for 310 transmitter sites by October 1993 and would be eligible for "grandfathered" frequency exclusivity.

Respectfully submitted,

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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing has been served upon all parties listed above by U.S.P.O. First Class Mail (postage prepaid), or by Hand Delivery, this 7th day of July 1994.



Richard O. Pullen

*Served by Hand Delivery.